EXHIBIT 1

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------x 18-CV-6591(CJS)

GEORGE MANDALA and
CHARLES BARNETT,

Plaintiffs,

vs.

Rochester, New York

NTT DATA, INC. June 27, 2018

Defendant.

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MOTION HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CHARLES J. SIRAGUSA
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

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THE COURT: The Court notes Christopher McNerney, Elizabeth Stork, Ms. Kleinman and Ms. Hoag on behalf of the plaintiffs.

And Ms. Pizzutelli on behalf of the defendant.

Let me just start with the plaintiffs. I really only need to hear argument on the 12(b)(6) motion. I understand the other arguments. But really what I'm most concerned about is the 12(b)(6) motion and going to the plaintiff's memorandum of law in opposition -- if you bear with me a moment.

MR. McNERNEY: Yes, your Honor.

THE COURT: You make this statement. I'm reading at Page 7.

"Thus, an allegation that a neutral employment practice denied equal opportunity to members of a protected class will suffice."

Is that really what you mean? So all I have to do to satisfy the Twombly/Iqbal standard of pleading is say in my complaint that this practice of requiring all your employees to wear red ties negatively impacted on Hispanic individuals, that would be enough?

MR. McNERNEY: Well --

THE COURT: Because that's exactly what you said there, right? And also I want to point somewhere plaintiff -- if you'll bear with me a moment -- it's mentioned that you argued in some of your cases on pre-Iqbal pleading standards and they point to, if I can say it right, *Swierkiewicz v. Sorema*, which, if memory serves me correctly, relies on *Conley* pleading which is pre-Iqbal and that's where on any kind of, any interpretation, you got a claim that goes forward but that's not the present pleading standard.

And let's just -- and if I don't get the issues correct, please point them out. What the defense maintains is this: That to have a disparate impact case, you have to demonstrate how the policy, the policy impacts on the protected class. And what the defense is suggesting is this: They're saying you have to show how this policy -- and I think it's pretty well fleshed out, although we go back and forth between convictions and incarceration -- it's felonies. I think your clients testified they weren't hired because they had felony convictions.

And they suggest that statistics about how generally African-Americans have more criminal convictions, generic criminal convictions than Caucasians doesn't cut it. You somehow have to demonstrate how the policy that the defendant put in place disparately impacts on the protected class who have the qualifications for the position and,

essentially, I think the defense is arguing you haven't done that.

Is that correct, Counsel, is that your position?

MS. PIZZUTELLI: Yes, your Honor.

THE COURT: So just to recap. They're saying, that's great, you got the statistics, you got the studies but that's not what we're talking about. What we're talking about is how this policy that's in place would adversely impact African-Americans and to do that, you got to do something more than just conclusory allegations. You got to show how people who are qualified -- how disproportionately African-Americans who are qualified for the position get denied over Caucasians who are qualified for the position and have felony records. I think those are the two extremes.

And I started out with what you said because, obviously, if you're right and all you got to do is allege, to satisfy the Twombly/Iqbal plausibility standard, all you have to do is allege that, look, we have this neutral policy: They want everybody to wear red ties. Well, we've got studies that show that African-Americans don't wear red ties so that adversely affects on our -- nothing to do with their -- obviously if there was an argument that it was a requisite of the job but there's no such argument here, correct?

MS. PIZZUTELLI: We're not at this stage --

THE COURT: Not at this stage.

MS. PIZZUTELLI: -- making that argument.

THE COURT: So we're just at the pleading stage. So I'll throw you the ball. Is she right or wrong?

MR. McNERNEY: Well, your Honor, we believe that she's wrong.

THE COURT: Why?

MR. McNERNEY: To cite the governing precedent in Iqbal, the question here is whether we raised a plausible inference and that's the point of the statistics here.

It is not at this stage to say conclusively that we have proven our case. That would be premature. What these statistics show is that African-Americans are more likely to be arrested and they're more likely to be incarcerated which raises the inference that they're more likely to be convicted of crimes; therefore, a policy that excludes --

THE COURT: Let me just stop you because are we talking crimes or are we talking felonies? If they're more likely to be convicted of crimes, are we drawing on an inference -- you're saying, okay, they're more likely to be arrested and incarcerated. So we can infer they're more likely to be convicted of crimes and from there we can infer they're more likely to be convicted of felonies? Because isn't that the policy that you're challenging that you're saying that the protected class is more likely to be

adversely affected by this policy of NTT not to hire people with felony convictions?

MR. McNERNEY: Well, your Honor, I think there's a distinction there. While it's true that our two plaintiffs had felony convictions, the policy we're challenging is broadly NTT's policy of screening out applicants because of their criminal records. At this point we have very strong evidence showing that they have this blanket policy. We have Mr. Mandala being told that he was being denied pursuant to a policy to deny people the job if they have felony convictions. We have Mr. Barnett being told that he was denied because of his conviction and then when he tried to reapply for other positions, he was told that he could not because of his felony. So we know that there's a criminal history screen out there and we know that it's a blanket screen that is denying people because of their criminal record. And so these --

THE COURT: Let me stop you because I'm confused. Have you alleged in the complaint that they're denying it because of their criminal record or denying -- so you're suggesting that they have a policy if you have any criminal record, if you've been convicted of a petit larceny, we're not going to hire you, if you've been convicted of misdemeanors, of menacing, a B misdemeanor, we're not going to hire you or is the policy that you're challenging that

we're not hiring if you have a felony conviction? What is the policy? I'm looking at the complaint. Where do you state the policy? I thought, and, again, I thought in the complaint both of the aggrieved individuals, Mr. Barnett and Mr. Mandala, say they were told they weren't hired because they had felony convictions.

MR. McNERNEY: Yes, your Honor, that is correct that they weren't hired because of their felony convictions. If you'll turn to Paragraph 93, the class definition, it's all African-American individuals who were denied employment based in whole or in part of NTT's policy and practice of denying employment to individuals with criminal convictions. To be sure, we'll need discovery on the precise contours of the policy. But what -- we have concrete allegation showing the existence of the policy and that is a criminal history screen.

THE COURT: So you're -- I guess I'm losing you. You're suggesting that their policy is if you have a conviction, we don't hire you -- of any kind.

MR. McNERNEY: Well, discovery will show the precise contours of the policy.

THE COURT: What does this mean? I'm looking at this language. Because Iqbal makes clear a plausible claim must come before discovery, not the other way around, citing a Southern District case, observing that, "pursuant to Iqbal

pleading standard, the Federal Rules of Civil Procedure do not" -- quoting Iqbal -- "do not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions or speculation."

MR. McNERNEY: But, your Honor, here we do have more than conclusions and speculation. We have statistics showing that it is more like -- that African-Americans are more likely to have a criminal record.

We've identified a mutual policy that because it screens out people because of their criminal records, is more likely to screen out African-Americans. We cited two audit studies showing that African-Americans with criminal convictions are less likely to get a job even when compared to whites with convictions.

Beyond that, we cited to the EEOC enforcement guidance on criminal records which itself has reviewed the statistics and said that it is a plausible inference to make that a criminal record screen that screens out on the basis of criminal records is going to have a disparate impact on African-Americans because of their race.

And then we have our two clients who were denied multiple separate jobs because of their criminal records and are African-American. This is a very robust showing at this stage for a disparate impact case.

And I would also like to point your Honor to the

two notices of supplemental authority that we provided, one as to *Jackson v. Tryon Park Apartments* and one to *Lee v. Hertz Corporation* where the Court found that general statistics of incarceration rates, when combined with a neutral policy that screens out applicants because of their criminal records -- in the Jackson case it was applicants to housing; in the *Hertz* case, it was applicants under Title VII for a job -- those, combined with the individual harm to the named plaintiffs, was more than sufficient to state a plausible claim at this stage.

THE COURT: I understand your position. Let me ask you this. Is there a distinction between -- and I understand your position -- but is there a distinction between not -- the allegation that they're screening people based on a criminal record and they're not hiring people if you have a felony conviction, are you saying that's a distinction without a difference?

MR. McNERNEY: Yes, your Honor, I think --

THE COURT: All right. Let me stop. Let me go over to the other side.

Counsel, what's your position? Essentially their position is correct, these general population statistics and this language from the guidance section disparate treatment discrimination criminal records which says a covered employer is liable for violating Title VII when the plaintiff

demonstrates that he was treated differently because of his race, national origin, for example, there's a Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African-American applicant based on his criminal record but hired a similarly-situated white applicant with a comparative criminal record. In other words, these general statements, statistics from wherever they come from, are sufficient.

It's clearly not -- I don't think you're disputing that the statistics show that African-Americans are more likely to have criminal convictions than perhaps Caucasian counterparts but you're maintaining that's not enough, is that correct?

MS. PIZZUTELLI: That's absolutely right, your Honor.

THE COURT: Why?

MS. PIZZUTELLI: That's not enough because it has absolutely no connection to what my client did or my client or my client's policy.

And so what they've alleged in the complaint, the facts -- which is what the Court needs to focus on under Iqbal is the facts. The facts that they've alleged in this complaint is that their clients were told that there's a felony conviction policy and what they've done is they've alleged in their complaint general, nonspecific, nationwide

statistics that, one, have absolutely nothing to do with felony convictions, two, have absolutely nothing to do with convictions -- by the way, they only address arrests and incarceration statistics and if you look at the EEOC guidance, the EEOC guidance doesn't even rely on convictions. They say that they're using incarceration as a proxy for conviction data.

And on top of all that in these other cases as well, which was a distinguishing factor with the *Lee* case and the *Jackson* case, we're talking about a different group of people here. We're talking about people who are applying for IT and technical positions and general population statistics are completely in-opposite when you're considering the types of positions that we're discussing here. And that comes from *Wards Cove*. According to *Wards Cove*, skill matters when you're analyzing a disparate impact case.

And so my position is, one, general statistics are not enough because they're completely divorced from what my client, my client period, has nothing to do with NTT data but on top of that, it's completely divorced from the facts that are alleged in this complaint.

THE COURT: Let's take the other side. Aren't they in a catch 22 then? They're suggesting it's enough because they need some discovery, cited what I think is the applicable law in discovery, but they're saying how could

they ever find out what the real situation is unless they get some discovery.

MS. PIZZUTELLI: Well, my response to that would be, your Honor, you shouldn't have filed a complaint in court then. Under Rule 11, you need to have facts. Under Iqbal and Twombly, you need to have facts before you come into court and before you file a complaint, period, let alone a nationwide class action with these types of serious and complex allegations.

THE COURT: So, is counsel wrong when he says it's sufficient -- and I'll ask you point blank -- he's maintaining that it's sufficient to allege in the complaint, one, that there's this neutral policy, two, that it adversely affects the protected class, in this case African-Americans, at least he suggested in his pleading that I read that that in and of itself is enough; but beyond that supported by allegations of general statistics from wherever that African-Americans are more likely to be incarcerated, convicted of crimes than Caucasians. He's maintaining that that's sufficient. Is that right or wrong?

MS. PIZZUTELLI: That's wrong. That's wrong. Under Iqbal and Twombly and I'd ask the Court to go back and look at the basic Black Letter pleading standards announced by the Supreme Court.

THE COURT: So what would he have to plead to go

forward?

MS. PIZZUTELLI: That's not, that's not on me.

THE COURT: I know it's --

MS. PIZZUTELLI: I think what we --

THE COURT: -- not on you.

MS. PIZZUTELLI: -- need to do, we need to look at --

THE COURT: But I'm asking you: What would he have to plead to go forward? Would he have to plead -- what facts would you plead? Would you have to plead that -- if they said that a disproportionate number of African-Americans with felony convictions were denied -- were offered jobs and the offer was retracted than Caucasians, would that be enough?

MS. PIZZUTELLI: No. That would be a similar conclusory allegation under Iqbal. I think what he needs to plead is he needs to go back, he needs to look at the text of the statute. Look at Title VII. Title VII says you need to plead a particular employment practice that causes a disparate impact on the basis of race. You need to look at what the Second Circuit has said you need to plead. That's *Brown versus Coach Stores* which addresses and affirms a district court dismissal on a 12(b)(6) motion of a disparate impact claim. And what *Brown* said was you need to plead facts that show a facially neutral employment policy or practice has a significant disparate impact.

THE COURT: So he'd --

MS. PIZZUTELLI: It's a difficult standard to meet.

THE COURT: So he'd have to prove something like this, according to you, he'd have to say, listen, over the last X number of years, NTT has offered jobs to 100 people, then withdrawn those job applications because they have felony records. Of those 100 people, 75 are African-Americans, that would be enough, right?

MS. PIZZUTELLI: Your Honor, I think that that's not, that's not a question for me. That's a question of whether the Court then would agree --

THE COURT: No, it is a --

MS. PIZZUTELLI: -- that --

THE COURT: No, it is a question for you.

MS. PIZZUTELLI: But that's not --

THE COURT: I'm trying --

MS. PIZZUTELLI: -- up to me.

THE COURT: I know it's not on you. I'm asking you a hypothetical. Is that the specificity that they would need to plead? Is that the specificity that would satisfy -- let me put it this way.

If we came here with that complaint, if the complaint said -- just listen to me, please -- the complaint said that over the last five years, NTT has offered jobs to 100 individuals, whatever the job was, and then withdrawn

those offers after a record check had revealed that each had felony convictions. Of those 100 individuals, 75 were African-American. If that was the allegation for disparate treatment, would you be moving to dismiss the complaint?

MS. PIZZUTELLI: Your Honor, I think I would be in a more difficult position to move to dismiss but I would also need to review, again, the *Wards Cove* decision and be guided by what the Supreme Court said in *Wards Cove*. And what *Wards Cove* said is you also need to look at who's in that applicant pool, who's making those applications.

THE COURT: Well, again, I should have qualified it by qualified individuals. If they allege that, that -- well, obviously they were qualified because they were offered the job. If they said they were interviewed for a tech supervisor position -- over the last six years, 100 people who were offered a position as tech supervisor, were deemed qualified and offered positions as tech supervisors were then denied after a record check revealed they had felony convictions. 75 were African-Americans. I mean, that would seem to me pretty specific.

I don't know how you would ever do that without having access. I don't even know if you could do that if you had access. I mean, I don't know how you'd ever -- even if you had discovery, you'd have to, what, go interview everybody and say, by the way, are you African-American? I

mean, I don't know how you would -- what you would even get in discovery?

What would you be looking for in discovery? Let's assume I said -- and I'm not saying I will -- but, for argument sake, I said, okay, you've convinced me, you've got enough go to discovery. Now what do you do?

MR. McNERNEY: Sure, your Honor. And there'd be, there'd be other areas of discovery we'd be looking for. But, broadly, we'd be looking for discovery on the contours of the precise policy and, second, we'd be asking for applicant data. And so we'd be looking at data as to who applied and who was hired and who was denied employment and the reasons for that.

THE COURT: All right. So I give you data that 100 people were denied employment after they were offered positions -- determined qualified -- because of a policy that we don't hire people with felonies. Now what do you do with that?

MR. McNERNEY: Well --

THE COURT: You go out and interview each of the hundred -- first of all, you'd have to determine which of the hundred are African-Americans. The application's not going to tell you that.

MR. McNERNEY: Well, your Honor, the application might. That is a question that we're going to have to

discuss with defendants as to what their data actually contains. A lot of employers do ask applicants to self-disclose.

THE COURT: But you don't have to. I've never seen one that requires you --

MR. McNERNEY: Sure.

THE COURT: -- to self-disclose.

MR. McNERNEY: And in those cases I would point the Court to *Houser v. Pritzker*, class cert decision where the Court granted class cert where the census, even though they were not obligated -- they were obligated to maintain race data, they did not.

So we got experts to take a look at the names of the people who applied and their locations, their addresses and to draw statistically defensible conclusions from that as to the overarching --

THE COURT: But we're not even --

MR. McNERNEY: -- racial composition.

THE COURT: -- at that stage. You haven't sought preliminary class certification yet, correct?

MR. McNERNEY: But, your Honor, that's one of the ways we could prove the case with discovery, to directly answer your question.

THE COURT: So you could prove the case by what, an expert to look at the last names of the individuals and where

they reside?

MR. McNERNEY: To determine race, to the extent it's not maintained. The question here, this is a disparate impact case so we're looking at the amount of people who got the job, the amount of people who didn't get the job because of their criminal records and the races of those individuals to determine whether NTT's policy, which screens out applicants because of their criminal records, screens out more African-Americans. And so that's why we're looking at race and that's also why, going back to the pleading stage, why the statistics that we pled raise a plausible inference of --

THE COURT: But the policy is not not giving them the jobs because they both had jobs. Two African-Americans were offered positions. It wasn't -- right -- it wasn't until they signed this release to get their criminal record check that they were then denied the positions?

MR. McNERNEY: Yes, your Honor. So they were given the offer and then that offer was revoked.

THE COURT: Right.

MR. McNERNEY: And it was revoked because of their criminal record.

THE COURT: Well, it was revoked according to them -- I'm not trying to make a big distinction -- it was revoked because, they were told, because they had a felony

conviction.

MR. McNERNEY: It was first revoked because of the information on their consumer report, which is the background check, report from the consumer reporting agency. So the employer received that report, looked at the information and determined that this criminal history, we're going to knock them because of it.

And then both Mr. Mandala and Mr. Barnett followed up. Mr. Mandala was told specifically it was pursuant to a policy not to hire people with felony convictions. Mr. Barnett was told it was because of his convictions and then only later when he applied to other jobs it was because of felonies.

But I would say that -- to go back to something that you said earlier, your Honor -- I believe that this is a distinction that doesn't really matter at this stage because whether the policy is am -- whether they're screening people with felony convictions or they're screening a broader set of misdemeanor convictions as well, either way, the statistics that we pled raise a plausible inference that that policy is going to disproportionately impact African-Americans because African-Americans are more likely to have the conviction, be it felony or other.

THE COURT: And the fact the client is offering the statistics don't carry the day because they don't relate -- I

think you're indicating that you have to show the group that was qualified for the position and out of the group that was qualified, how many were denied the position because of whatever, felony criminal records, and did that group, was that group disproportionately unfair to African-Americans?

MR. McNERNEY: So --

THE COURT: And you're saying you don't have to do that now?

MR. McNERNEY: Your Honor, I believe what this comes down to is a question of causation and, as some of the case law we cited analyzing disparate impact at the motion to dismiss stage has said, you don't have to establish causation at this stage. What defendants are asking us to do is to prove our claims at this stage, to prove that there actually was impact but that is improper at a motion to dismiss stage. At the motion to dismiss stage we just need to raise a plausible inference.

And I think it's telling that counsel is citing to *Wards Cove* because that was a decision decided after a bench trial after discovery, after they got the statistics, the Court was saying that's not enough. But we're not there yet. We're at the --

THE COURT: Let me ask you another what-if question. So we get by this. We know it's not a jury trial, right, it's a trial before the Court?

MR. McNERNEY: For the disparate impact claim, yes, your Honor.

THE COURT: So how do you prove it? If we went to trial, how would you prove it?

MR. McNERNEY: Well, your Honor, we get the statistics -- well, first we establish a neutral policy.

THE COURT: Okay. Done. Let's say we establish a neutral policy. The neutral policy -- and let's make it in your favor -- we don't hire people with criminal convictions.

MR. McNERNEY: Mm-mm.

THE COURT: Okay, neutral policy, done.

MR. McNERNEY: So then we would look at the applicant data. We would -- and we would have experts testify that this applicant data shows that this policy screens out more African-Americans than, like, the absence of this policy otherwise should. So because of this policy --

THE COURT: What would you show? How do you make your case? So let's say you get the applicant data, that somehow you put together and say all right -- and what timeframe are we looking at? How far back can you look at applicant data?

MR. McNERNEY: Well, we'd ask for applicant data through the class period so 300 days before the filing of the EEOC.

THE COURT: So what date does that give us?

MR. McNERNEY: I believe that's August 6th, 2016, your Honor.

THE COURT: All right. Let's say -- and, again, I have no idea -- but let's pick a number. Let's say from that period, 200 people were denied positions. I mean, does it have to be comparable to the position your clients applied for? Could it be any position in NTT, is it any position?

MR. McNERNEY: Well, your Honor, we believe this is a policy that applies across all positions at NTT.

THE COURT: So let's say it applies across, whether you're a janitor at NTT, whether you're a tech specialist, you convinced me you look at all the positions, okay.

And however you do it, you determine that over this period of time 500 people have been denied positions because they have criminal convictions. We're extending it, not saying felony conviction.

And of those 500 people, 245 were Caucasian and 255 were African-American. Do you win? Lose?

MR. McNERNEY: So, your Honor, it depends on the percentage of African-Americans and Caucasians that applied. So, if that percentage --

THE COURT: No, it doesn't. It doesn't pertain to the ones who applied. You just said it pertains to the ones that were offered positions and then the offer was refused because they have criminal convictions.

MR. McNERNEY: So assuming that their policy is, in fact, you're given a conditional offer --

THE COURT: And let me stop you because you're not claiming in this case disparate treatment. You're not saying they were denied positions because if you were, I'm sure you would have made that claim on their behalf that they were denied positions for which they were qualified for under circumstances that raise an inference of discrimination. You're not.

So I'm saying that under the posture of this lawsuit, you're maintaining that there was a disparate impact and the disparate impact is that people who are qualified for positions were offered positions and were then denied them because of their criminal records, felony or otherwise, disparately impacts on African-Americans.

And my question to you was specifically: Okay, you go through all this data. You find 245 Caucasians were denied positions. You find 255 African-American were not denied but offers were withdrawn. Do you win? Lose?

MR. McNERNEY: Well, your Honor, taking this hypothetical, it still depends on the number of applicants who were given a conditional offer. So the question is --

THE COURT: I'm telling you 500 were given a conditional offer.

MR. McNERNEY: Okay. And then it depends on how

many of those were African-American.

THE COURT: 200. The pool we're talking about is 500 were given a conditional offer. The offer was withdrawn after a criminal record check. That's the neutral policy you're complaining about. And I'm saying of those 500, 245 were Caucasian, 255 were African-American.

Is that disparate -- I'm just asking -- is that disparate impact because 5 more were affected?

MR. McNERNEY: Well, at this stage we're talking about who was given a conditional offer. So then it depends on how many of those people in each racial group then was denied because of their criminal record. And if a statistically significant number of the African-Americans --

THE COURT: Well, how would I -- if we were at trial, how would I -- it would be in front of me -- how would I determine what's statistically significant? I'm asking you if it was 250 and 250 that were denied -- remember what I'm saying?

MR. McNERNEY: Yes.

THE COURT: The policy is 500. 500 people were offered positions across the board to NTT, janitors, techs, whatever, and they were offered positions. Each of those 500 we said we need to do a record check. Record check was done on each of those 500. The record check revealed that, with respect to those 500, each had some type of criminal

conviction, felony, misdemeanor, whatever and on each of those 500 offers, the offer was withdrawn. 245 are Caucasian, 255 are African-American. That's what you proved to me at trial. We're now at summation. Now, you're going to argue that that's a disparate impact?

MR. McNERNEY: Well, with the caveat, your Honor, that depending on the state -- some states you can run the background check before the conditional offer and, so, there may be a larger pool. It may not just be individuals who were conditionally offered employment and then have it revoked. They may have screened out individuals because of their criminal records before that point. But with that caveat --

THE COURT: Right.

MR. McNERNEY: -- to the extent you're saying that more African-Americans were screened out by this policy, then that potentially could state a disparate impact claim.

THE COURT: 10 more were screened out because of this policy, that would be a disparate impact claim?

MR. McNERNEY: Well, your Honor, I'm not able to do -- tell you right now whether that's a statistically significant number. We have an expert to do that. We have methodology. This would be a Daubert question as to whether that methodology --

THE COURT: Well, what if it was 250 and 250?

MR. McNERNEY: The same amount were screened out?

THE COURT: Then you lose, right? Or would you argue that it should be less because then we go back and argue that, no, 75 percent of the population or 25 percent of the population or 30, whatever it is, were African-American? Or is it because it's the same number?

MR. McNERNEY: Well, your Honor, it still depends on, like, the percentage of the applicant pool that is white and black. That is sort of the first point that then you're comparing the amount of people then screened out and whether the people being screened out that are African-American is a higher percentage than, than their portion of the applicant pool.

THE COURT: Okay. When you say the applicant pool, we're not talking about the applicant pool because the applicant pool may include people who aren't qualified for the positions, right?

MR. McNERNEY: Well --

THE COURT: I applied for the job. I don't get it because I don't have a qualification and I didn't get turned down -- you're talking about you have to be turned down for the job because of your criminal record, isn't that what we're talking about?

MR. McNERNEY: Well, the pool, your Honor, is broader than this because it also includes the individuals

who were given the job, right, who are not screened out because of this policy?

THE COURT: I understand that. You're saying the pool includes -- but the reason you didn't get the job, the reason that the offer was withdrawn is because you had a criminal record.

MR. McNERNEY: Right and so --

THE COURT: That's the pool you're talking about.

MR. McNERNEY: Well, your Honor, like -- let's take a total applicant pool of maybe 1,000 applicants or, as you said, 500, a certain percentage of those are going to get the job, right, you know, that's -- that's also relevant to the analysis to the extent that those are white people who are getting the job because they're less likely to get a criminal record than African-Americans. And so we also have to consider those people, too.

THE COURT: I'm not following this because, to me, your argument is this: You get by the complaint. Now we're at trial. You're trying to show me that, listen, this policy that NTT has of whether it's offering people jobs and then getting a record check in states that don't allow you to do the record check until the job is offered apparently or whether it's refusing them in the first instance and not making any offer on record checks, that's the policy we're concerned about.

So what I'm giving you is, okay, you go through your discovery and across the nation you determine that you'd have to look at a comparison. So you look at, all right, there were an equal number of Caucasians who were denied jobs who were -- offers were withdrawn and there was an equal number of -- I mean, I'm trying to figure out what is your pool? I mean your pool is people who were denied a job because of a criminal record, isn't that what you're looking at?

MR. McNERNEY: No, the pool would be, your Honor, using this model is all applicants given a conditional offer of employment and then the question we'd be looking at is who was hired and who was being screened out because of their criminal records and what are their races and are more African-Americans being screened out disproportionately.

THE COURT: Right. And that's where we started.

MR. McNERNEY: Yeah.

THE COURT: First of all, you said it's not just people who were given conditional offers. You told me that the pool also includes people who were never given offers in the first place because the record check was done before the conditional offer.

MR. McNERNEY: Well, that's one possibility, your Honor, that we'd need discovery on.

THE COURT: But the bottom line is, what I'm saying

is you identify -- if you went through discovery, you would have to identify who didn't get jobs because of a criminal record, fair statement?

MR. McNERNEY: Yes, and that's something that --

THE COURT: And then you'd have to see, okay, of those people who didn't get jobs because of a criminal record, how many were Caucasian, correct, how many were African-American?

MR. McNERNEY: Yes, your Honor.

THE COURT: And then you'd have to say, okay, this policy had a disparate impact on African-Americans because a higher percentage of African-Americans didn't get the jobs than Caucasians, isn't that right?

MR. McNERNEY: Yes, your Honor.

THE COURT: Isn't that how you have to prevail?

MR. McNERNEY: That's correct, your Honor.

THE COURT: And you're telling me that to determine whether -- to prevail, you have to show that it's statistically significant and you'd have to get some expert who I'd have to have a Daubert hearing to determine, okay, you're qualified, this isn't junk science, I'm going to let you testify and you can tell me that.

So, if one more African-American didn't get the job than a Caucasian, that's statistically significant -- I'm not suggesting you'd say that -- but that could be the opinion.

And I'd have to decide whether there was this disparate impact, whether more African-Americans than Caucasians didn't get the job because of a criminal record and if that was the case, whether that I determine that's statistically significant --

MR. McNERNEY: Yes.

THE COURT: -- is that how it would go?

MR. McNERNEY: Your Honor, I would just note that in these cases -- and this is the routine practice in these cases -- defendants would also be putting on a competing expert.

THE COURT: Right.

MR. McNERNEY: So you'd have the benefit of two separate experts.

THE COURT: Or they'd put on an expert to say, you know what, somehow this policy has this business-related reason, right?

MR. McNERNEY: Right. That's the next, the second inquiry after the disparate impact inquiry.

THE COURT: It's interesting. Mr. Pedersen just read some study that said people who have licenses, who drive with a license are more likely to be on time at work than people who have, like, suspended licenses. So, if you were here saying that this policy of the widget company to only hire people who have valid licenses disparately impacts an

identifiable protected group, then the widget company could come back and say, well, yeah, we do it for a legitimate business reason because statistics show, studies show that people with licenses get to work on time. Would that --

MR. McNERNEY: Right, your Honor. And that's the cross check on the disparate impact analysis, that it has to be, the policy in question, defendants can then show it's job-related and consistent with business necessity. We don't believe that this policy will show it to be.

THE COURT: No. And no one's made that argument. Whether they would or not, I have no idea but we're not at that stage. I understand the issues.

Put it back simply. I come back to where I started. You maintain that what you pled is enough, even I think at least in your memorandum without the statistics, you're claiming that what you pled is enough, that the policy disparately impacts on African-Americans.

And I understand the defense position.

We'll issue a written decision.

Thank you, Counsel.

MS. PIZZUTELLI: Thank you, your Honor.

MR. McNERNEY: Thank you, your Honor.

(**WHEREUPON**, proceedings were adjourned.)

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CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court of the Western District of New York before the Honorable Charles J. Siragusa on June 27, 2018.

S/ Diane S. Martens

Diane S. Martens, FCRR, RPR
Official Court Reporter